IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1487 OF 2001
IN
SUIT NO.2178 OF 2001

Export Credit Guarantee
Corporation of India Ltd. ..Plaintiffs.

Vs.

Mrs.Annamma Philip & Ors. ..Defendants.

ALONGWITH

NOTICE OF MOTION NO.1488 OF 2001
IN
SUIT NO.2177 OF 2001

Export Credit Guarantee
Corporation of India Ltd. ..Plaintiffs.

Vs.

Mr.T.Mathew (P.T.M. Family
Trust) & Ors ..Defendants.

Ms.Rajni Iyer, Senior Counsel with Mr.Vikram Trivedi and Mr.S.R.Tilokchandani and Mr.Durgesh Khanapurkar i/b.M/s.M.K.Ambalal & Co. for the Plaintiffs.

Mr.Aspi Chinoy, Senior Counsel with Mr.Pradip Sancheti i/b.Mr.H.K.Sudhakara & Ms.Tushna Thapiyal for Defendant Nos.3 and 7.

CORAM : S.J. VAZIFDAR, J.
DATED 26TH SEPTEMBER, 2006

ORAL JUDGMENT :

As a substantial part of the basis of my order in both the Notices of Motion is the same, it would

be convenient to dispose of both the Notices of Motion by this common order :

2(a). Defendant Nos.1, 2 and 3 in Suit No.2177 of 2001 are the trustees of the P.T.M. Family Trust. Defendant No.4 is the Dalamal House Commercial Premises Co-operative Society Ltd.

(b). Defendant Nos.5, 6 and 7 in Suit No.2178 of 2001 are Defendant Nos.1, 2 and 3 in Suit No.2177 of 2001. Defendant No.4, i.e. the society, is Defendant No.4 in this suit as well. Defendant Nos.1, 2 and 3 are the trustees of the Idichandy Family Trust, to whom Defendant Nos.5, 6 and 7 have purported to sell the property in 1983.

(c). For convenience, the reference to the Defendants hereafter, will be to Defendant Nos.1, 2 and 3 in Suit No.2177 of 2001 who are Defendant Nos.5, 6 and 7 in Suit No.2178 of 2001.

3(a). Suit No.2177 of 2001 is filed for specific performance of an agreement dated 15.5.1980 and a purported lease dated 8.7.1992, by sale and transfer of the suit premises viz. Unit Nos.21 and 22 and a terrace adjacent thereto. The Plaintiffs have also

claimed certain monetary amounts with which we are not concerned.

(b). Suit No.2178 of 2001 is filed for specific performance of the said agreement dated 15.5.1980 as well as two further agreements dated 7.2.1981 and 1.7.1981 and an alleged oral agreement for the sale and transfer of portions of Unit No.31 situated in the same building as the premise in Suit No.2177 of 2001. The Plaintiffs have in this suit as well, claimed certain monetary amounts with which again, we are not concerned.

4. The main prayer in these Notices of Motion is to restrain the Defendants from instituting/filing and/or from proceeding with any proceedings under the Maharashtra Rent Control Act, 1999 for recovery of possession of the aforesaid premises and/or from taking any steps/action in pursuance of any such proceedings. The Plaintiffs have also sought certain disclosures, to which, the Defendants have no objection. The Plaintiff has further sought orders for the payment of the society's dues and taxes.

5(a). An agreement dated 15.5.1980 was executed

between the Plaintiffs and the Defendants. Clause 1 thereof provided that the Defendants shall grant to the Plaintiffs a lease of Unit Nos.21 and 22 on the second floor, together with 4700 sq ft. of terrace area and a part of Unit No.31 on the third floor, admeasuring 2500 sq. ft. (Unit No.31 comprises of an aggregate of 5000 sq. ft.). The reliefs in Suit No.2177 of 2001 are restricted to Unit Nos.21 and 22. The reliefs in respect of Unit No.31 are claimed in Suit No.2178 of 2001.

(b). Clause 1 makes it clear that the agreement dated 15.5.1990 is an agreement 'to lease' and not an agreement of lease. Clause 2 of the agreement provides that the lease referred to in clause 1, shall contain various covenants and provisos. The relevant part reads as under :

> "2. Such lease shall contain covenants and provisos of which the following is the short effect :
>
> (A) .....
>
> (B) .....
>
> (C) P r o v i s o s :
>
> (i) .....
> .....
>
> (ii) Right to the Lessee at the end

> of the said term of 20 (Twenty) years to renew the Lease for further period of 10 (Ten) years at the same rent and on the same terms and conditions and thereafter to renew it for successive periods of 10 (Ten) years at a time at a rent to be mutually agreed upon but not exceeding 10% of the rent charged for the previous term TOGETHER ALSO with a right to purchase the reversion at any time after the said first term of 20 (Twenty) years the price upon such purchase being calculated at the rate of Rs.100/- per square foot of the built up area. No price being charged or paid for the terrace area of approximately 4700 sq. ft. on the 2nd floor of the said Dalamal House :" (emphasis supplied)

6. On the same day i.e. on 15.5.1980, the Defendants also executed a power of attorney in favour of the Plaintiffs authorising/empowering the Plaintiffs to execute, sign and deliver inter-alia:-

> "(i) The Lease of the said property to the Lessee viz. Export Credit and Guarantee Corporation Limited in the form of Lease previously approved under our signature as the 2nd day of May 1980 and attached hereto with such alterations as may be mutually agreed upon between the parties thereto.
>
> (ii). .....
> .....

> (iii) To execute after the said terms of 20 years Conveyance and/or Assignment of demised premises in favour of Export Credit and Guarantee Corporation Limited and/or their nominees as per the agreement to lease.
>
> (iv) .....
> .....
>
> AND WE FURTHER HEREBY CONFER on the said Lessee the following further powers, namely:-
>
> (a) Power to present for registration and to register or cause to be registered the said Lease and the said mortgage or charge with the Registrar of Assurances at Bombay and to register the transfer of the said shares of the Co-operative Society or Limited Company."

7. In Suit No.2177 of 2001, the reliefs are confined to Flat Nos.21 and 22 only. In Suit No.2178 of 2001 the Plaintiffs have sought reliefs in respect of Flat No.31.

8. The reliefs claimed in Suit No.2178 of 2001 are based on three agreements dated 15.5.1980, 7.2.1981 and 1.7.1981 pertaining to 2500 sq. ft. 500 sq. ft. and 2000 sq. ft. respectively in Unit No.31.

The agreements dated 15.5.1980 and 7.2.1981 contain a similar clause, providing for the

execution of a lease deed, which, in turn, would contain a clause authorising the Plaintiffs to purchase the reversionary rights.

The agreement dated 1.7.1981 for 2000 sq. ft. however does not contain such a proviso/clause. The Plaintiff has however pleaded an oral agreement to that effect.

9. A power of attorney similar to the one referred to above, was also executed in respect of the agreements dated 7.2.1981 and 1.7.1981. In exercise of the powers under the said agreements and the said power of attorney, the Plaintiffs purported to execute a lease deed and lodged the same for registration.

10. It is not necessary while considering the reliefs in the Notices of Motion, to enter into the merits of the disputes between the parties except to a very limited extent.

11. Ms.Iyer bases her case to restrain the Defendants from instituting the said proceedings on section 41(b) of the Specific Relief Act, which reads as under :

> "**41.** Injunction when refused. - An injunction cannot be granted-
>
> (a). .....
> .....
>
> (b). to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought;"

12. In support of her submission, that a Court has power to restrain any person from instituting or prosecuting any proceedings already instituted in a Court subordinate to that from which the injunction is sought, even if in respect of such proceedings the Court has no jurisdiction, Ms.Iyer relied upon the judgment of a learned Single Judge of this Court in *William Jacks & Co. (India) Ltd. v. Nilima Dinesh Prasad & Ors., AIR 1992 Bombay, 126*.

13. Another learned Single Judge of this Court in *Aderbad Co-operative Housing Society Ltd. v. Aspi Golwalla (2005) 8 LJ Soft, 26*, expressed his reservations as to the correctness of this judgment. The matter has been referred to a Division Bench but has been adjourned sine-die. In any event, for the purpose of this judgment, I have proceeded on the basis that I have the jurisdiction and power to

grant the reliefs sought.

14. Section 41(b) does not stipulate the conditions and circumstances in which the power conferred therein is to be exercised. It is a discretionary relief the grant of which must depend upon the facts and circumstances of each case. My attention has not been invited to any reported judgment which considers the manner of exercise of powers while considering an application under section 41(b). It appears to me that there is no single principle that governs the exercise of this power. It is neither necessary nor possible to enumerate exhaustively the principles on and the circumstances in which the power under section 41(b) ought to be exercised. I will therefore necessarily confine myself to a formulation of only such principles as are necessary for deciding this application.

15. While considering an application under section 41(b) of the Specific Relief Act, 1963, it is imperative to bear in mind that any person is entitled to adopt proceedings in a Court or before a tribunal or authority to enforce his rights or seek redressal of his grievances. An order restraining him from instituting or prosecuting legal

proceedings already instituted, is an exception to this rule. A curtailment of this right is a serious matter.

16. This aspect leads to the first principle under section 41(b). The onus must necessarily be on the party seeking reliefs under section 41(b) to make out a strong case. The Court must exercise extreme caution and restraint while granting an order under section 41(b), restraining a party from instituting/prosecuting legal remedies. As a corollary, the presumption must always be that the mere institution of legal proceedings does not prejudice the opposite party for ultimately the Courts are always there to remedy any wrong that may be caused to the opposite party by the institution or prosecution of legal proceedings.

17. The next principle is axiomatic. In the first instance the Plaintiff must establish that substantial prejudice would be caused by the refusal of an application under section 41(b). That is the purpose of an injunction. The prejudice must not be merely by reason of the Plaintiff being required to defend a litigation.

18. The facts of this case do not require me to consider whether in addition to the second principle the Plaintiff must also establish that the Defendant will not suffer any harm or prejudice. I therefore express no opinion in regard thereto.

19. However, the Plaintiff must establish that the grant of an injunction under section 41(b) will cause less prejudice to the Defendant than the prejudice which may be caused to the Plaintiff by the refusal of such an injunction. This is the third principle. To hold otherwise would be neither logical nor fair. The purpose of an injunction under section 41(b) is to prevent prejudice being caused to the applicant. Surely, that cannot be at the expense of the opposite party.

20. Further the approach of a Court while considering an application to restrain the institution of a proceeding must of necessity, be more strict than while considering an application to restrain a party from prosecuting a proceeding already instituted.

21. The mere institution of proceedings, per-se, would not normally prejudice a party. It is the

prosecution of the proceeding which may do so. When a proceeding has already been instituted, the Court is in a better position to determine whether or not the proceedings are such, as warrant reliefs under section 41(b).

22. An application to restrain a party from even instituting a proceeding would in most cases involve an element of speculation regarding not merely the nature of reliefs to be claimed, but also regarding the cause of action and the facts in respect thereof. Moreover, such an order may, in a given case, lead to fragmentation of the Defendant's proceedings. For instance, on the same cause of action a Defendant may be entitled to various reliefs such as for possession, declaration, damages and injunction. A Court would be in a better position to judge the matter once the proceeding is instituted.

23. Further, the prevention of a party from seeking even interim reliefs is an important aspect while considering an application under section 41(b). As a normal rule, an injunction under section 41(b) ought not to be granted if, by doing so, a party would be prevented from seeking even interim

reliefs. I will illustrate this point later on the basis of the facts of this very case.

24. The five principles I have mentioned are relevant while deciding this application.

25. The Plaintiffs have not made out any case for the grant of an order under section 41(b). Firstly, the Plaintiffs have not established that they would suffer any prejudice by the Defendants instituting proceedings, to establish their rights. Secondly, an injunction, if granted, would cause not merely substantial prejudice, but grave harm and injury to the Defendants at every stage including during the pendency of the proceedings.

26. The only ground urged by Ms.Iyer in support of the Notice of Motion is that there is a possibility of conflicting decisions between the Courts sub-ordinate to this Court and the decision which may be rendered in the above suits. This, by itself, can never be a ground for exercising powers under section 41(b).

27. Moreover, the question of conflicting decisions does not really arise in this case. The proceedings

in the Small Causes Court, if instituted, would be subject to any orders or judgments passed by this Court. Nor would it make any difference if the orders or judgments passed by the Small Causes Court are challenged before this Court. The doctrine of precedent would apply. There would be no question of any conflict of decisions. Further, the proceedings could be clubbed and heard by the same Judge for convenience.

28. The question of conflicting decisions arise in arbitration matters. There however the possible conflict was a real one for the decision in one would be by a private forum viz. the arbitrator and the decision of the other would be by a public forum viz. the Court. No such difficulty arises here. Both proceedings are before Courts. Recourse by the aggrieved parties is to this Court and then to the Supreme Court.

29. There is another important difference. Even assuming that there is any possibility of conflicting orders in the present case, the same can be taken care of in several ways. For instance, the appropriate Courts have the power under section 24 of the Code of Civil Procedure to withdraw

inter-alia a suit filed in the Small Causes Court and try and dispose of the same. Section 24 of the C.P.C. reads as under :-

> "**24. General power of transfer and withdrawal.**-(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may, at any stage-
>
> (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
>
> (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it; and
>
> (i) try or dispose of the same; or
>
> (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
>
> (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.
>
> (2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which 1[is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or

withdrawn.

(3) For the purposes of this section,-

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.]

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.]"

30. Further, the Court can also order which of the two proceedings will be decided first. The remedy under section 10 of the C.P.C. is also available. This cannot be done in the case of arbitrations.

31. Whether it would also be necessary for the Court to come atleast to a prima-facie conclusion that the proceedings which may be instituted or the proceedings which are already instituted, would be vexatious or ex-facie unsustainable or aim at prejudicing the Defendant in any manner before granting an injunction under section 41(b) is also a

question which in the facts of this case, is not necessary for me to consider.

32. This is for the reason that in the present case it cannot be said that the defences raised by the Defendants are unsustainable or aimed only at harassing the Plaintiffs. I do not intend dealing with all the defences raised by the Plaintiffs. Suffice it to state that even on the questions of law, the Defendants have set up a case, which, in my opinion, they ought not to be prevented from doing even as an interim measure.

33. For instance, the lease deed has been sought to be registered by exercising powers under the power of attorney. Admittedly, the power of attorney was itself not registered. It would appear therefore that the registration itself is not valid. In order to register a document in exercise of powers under a power of attorney, it is necessary that the power of attorney itself was registered. Secondly, the agreements themselves have been repudiated since 1981 itself, on various grounds. It is true that in an interim order dated 5.2.1988 a learned Single Judge of this Court, prima-facie, observed that there are no merits in the Defendant’s case. These,

however, are only prima-facie observations as noted by the learned Judge himself and, again, by no stretch of imagination conclude the Defendants at every stage. The lease deed in respect of Unit Nos.21 and 22 has only been lodged for registration. The same has not been registered as yet.

34. It is also pertinent to note that in respect of the agreement dated 1.7.1981 for 2000 sq. ft., which forms a part of Unit No.31, there is not even a clause which contemplates the execution of the lease containing a provision, entitling the Plaintiffs to purchase the reversionary right. An oral agreement in this regard is pleaded. The denial of the oral agreement and the issue based on such a denial can hardly be said to be frivolous or vexatious.

35. On the other hand, to grant an injunction merely on this basis would be unfair to the Defendants. The Defendants have impugned the Plaintiff’s rights and title in respect of the said premises. I see no reason to prevent them from exercising their normal rights which any person has for approaching the Courts of law for redressal of their grievances and to establish their rights. If

any order restraining the Defendants from adopting any such proceedings is passed, it would cause irreparable harm and injury to the Defendants. It would allow the Plaintiffs to continue to remain in use and occupation of the premises, without the Defendants even having an opportunity of preventing them from doing so.

36. For instance, if the Defendants were to adopt proceedings, they could always seek reliefs regarding the terms on which the Plaintiffs are entitled to continue to remain in occupation or possession. The reliefs would naturally depend upon the case made out by the Defendants for the same. To grant an injunction, would prevent the Defendants from even seeking such reliefs.

37. In the circumstances, the Plaintiff is not entitled to any reliefs under section 41(b).

38. At the interim stage, it is not possible, in the facts and circumstances of the present case, to order the Defendants to deposit any amounts in this Court. The title itself is in dispute. These orders can be granted only at the final hearing of

the Suit.

39. In the circumstances, the Notices of Motion are made absolute in terms of prayer (a) and are dismissed in respect of the other reliefs.